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NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE REDBACK NETWORKS, INC.
SECURITIES LITIGATION.

Case Number C-03-5642-JF (HRL)

ORDER GRANTING MOTION FOR
RECONSIDERATION

THIS DOCUMENT RELATES TO ALL
ACTIONS.

On January 21, 2005, the Court issued an order dismissing Plaintiffs' claims with leave to amend as to certain defendants and without leave to amend as to others ("January 21 Order"). Plaintiffs seek reconsideration of the dismissal without leave to amend as to one defendant, Randall Kruep ("Kruep"), on the ground that newly discovered evidence has revealed facts that could be added to the complaint and that would be sufficient to state a § 10(b) claim against Kruep. Plaintiffs emphasize that they are not requesting reconsideration of Kruep's dismissal, but rather are requesting reconsideration of the Court's denial of leave to amend.

The Court dismissed Plaintiffs' claims against Kruep because there were no allegations that he made any of the allegedly false or misleading statements underpinning Plaintiffs' fraud on the market theory. January 21 Order at 7-8. In doing so, the Court expressly adopted the reasoning of a factually similar case, *In re Homestore.com, Inc. Sec. Litig.*, 252 F.Supp.2d 1018 (C.D. Cal. 2003), and quoted the following language from that case:

1 Essentially what plaintiff alleges is a scheme to make a deceptive statement or
2 material omission. Yet the principal “wrong” alleged under the rule is the
3 statement, not the scheme. Therefore, it is appropriate to require defendants in
this case to be connected in some material way to the drafting of the statements
made to the investing public.

4 *Id.* at 1041.

5 Plaintiffs assert that new evidence indicates that Kruep was materially connected to the
6 drafting of statements made to the investing public, i.e., that Kruep provided and certified false
7 information for publication in Redback’s press releases, financial statements and SEC filings.
8 Defendants assert that the new evidence does not demonstrate that Kruep personally made any of
9 the allegedly false or misleading statements to the public, and that as a result any amendment
10 would be futile. However, based upon the reasoning set forth in *Homestore* and adopted by this
11 Court, Plaintiffs could make out a viable § 10(b) claim against Kruep if he was sufficiently
12 involved in the drafting of statements released to the public, even if he did not make the
13 statements personally.

14 Plaintiffs have provided an adequate explanation as to why the evidence in question could
15 not have been discovered earlier in the exercise of due diligence. Accordingly, for good cause
16 shown, the Court GRANTS Plaintiffs’ motion for reconsideration of the January 21 Order insofar
17 as that Order dismisses Kruep without leave to amend. Plaintiffs shall file any amended
18 pleading, setting forth all relevant allegations as to Kruep, within thirty days after service of this
19 Order. The Court’s ruling on Plaintiffs’ motion for reconsideration is without prejudice to
20 Kruep’s filing of a motion to dismiss on the basis of failure to state a claim or other appropriate
21 ground.

22 IT IS SO ORDERED.

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24 DATED: 5/25/05

25 /s/ (electronic signature authorized)

26 JEREMY FOGEL
27 United States District Judge
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1 This Order has been served upon the following persons:

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